

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)

Implementation of the Pay Telephone)

CC Docket No. 96-128

Reclassification and Compensation)

Provisions of the Telecommunications)

Act of 1996)

The Michigan Pay Telephone)

Association's Petition for Declaratory)

Ruling Regarding the Prices Charged by)

AT&T Michigan for Network Access)

Services Made Available to Payphone)

Providers in Michigan)

**COMMENTS OF THE
AMERICAN PUBLIC COMMUNICATIONS COUNCIL
ON THE MICHIGAN PAY TELEPHONE ASSOCIATION'S
SECOND PETITION FOR DECLARATORY RULING**

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June 23, 2006

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Pursuant to the Commission's Public Notice dated February 8, 2006, the American Public Communications Council ("APCC") hereby files comments in support of the Michigan Pay Telephone Association's ("MPTA's") request for a declaratory ruling.¹ MPTA requests that the Commission (1) review recent orders of the Michigan Public Service Commission ("MPSC") that attempt to apply the NST to the local usage element of AT&T Michigan's payphone line rates, and (2) correct the MPSC's

¹ Michigan Pay Telephone Association's Second Petition for a Declaratory Ruling (filed May 22, 2006) ("MPTA Petition").

misinterpretation and misapplication of the *Payphone Orders*² and this Commission's *NST Orders*³ clarifying the NST.

I. INTRODUCTION

The MPTA Petition is unique and raises different issues from any other petition currently before the Commission. The other state payphone association petitions currently pending in this docket raise a different issue not explicitly addressed by the *NST Orders* – namely, whether the states have correctly interpreted and applied the *Payphone Orders*' requirement that the BOCs refund the charges they assessed in excess of NST-compliant rates. Therefore, the MPTA Petition should be addressed separately and should not delay resolution of the pending petitions on the refund issue.

The uniqueness of the MPTA petition is significant for a number of other reasons as well. In the four-and-a-half years since the Commission issued the *NST Review Order* (and the six years since the Commission issued the *NST Designation Order*), state public

² *Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Report and Order, 11 FCC Rcd 20541 (1996) ("*First Payphone Order*"), recon. 11 FCC Rcd 21233 (1996) ("*First Payphone Reconsideration Order*"), *aff'd in part and rev'd in part*, Ill. Pub. Telecomms. Ass'n v. FCC, 117 F.3d 555 (D.C. Cir. 1997), *cert denied*, Virginia State Corp. Comm'n v. FCC, 523 U.S. 1046 (1998); Order, 12 FCC Rcd 20997 (CCB 1997) ("*First Waiver Order*"); Order, 12 FCC Rcd 21370 (CCB 1997) ("*Second Waiver Order*") (collectively, the "*Payphone Orders*").

³ *Wisconsin Public Service Commission, Order Directing Filings*, Order, 15 FCC Rcd 9978 (Com. Car. Bur. 2000) ("*NST Designation Order*"), *aff'd in part and modified in part*, Memorandum Opinion and Order, 17 FCC Rcd 2051 (2002) ("*NST Review Order*"), *aff'd* *New England Pub. Comms. Council v. FCC*, 334 F.3d 69 (D.C. Cir. 2003), *cert denied*, 524 U.S. 2065 (2004) (collectively, the "*NST Orders*").

service commissions have completed numerous proceedings to review the BOCs' payphone line rates in the various states. Significantly, the instant MPTA petition is the only time in this entire period that a state payphone association or other party has petitioned the Commission to correct a state commission's misinterpretation or misapplication of the NST with respect to a BOC's payphone line rates.

The fact that no other party has sought review of a state commission decision indicates that the Commission's attempt to provide guidance to the states regarding the correct application of the NST was successful. When the Commission issues clear guidance on a payphone issue, as it did in the *NST Orders*, it can expect the states generally to follow that guidance and to apply the federal law as clarified. The Commission can be optimistic that when it issues further guidance, both here and in the NST refunds matter, the Commission's effort will produce positive results.

The fact that no other state payphone association petitioned for review of state commissions' applications of the NST also means that PSPs do not lightly seek the Commission's intervention in state proceedings when the Commission's orders are clear. That the MPTA has done so in this case strongly suggests that the matter raised by MPTA deserves the Commission's most careful scrutiny.

A ruling by the Commission is especially necessary and appropriate in this case. MPTA has continuously and vigorously litigated at the state level for the last nine years to obtain cost-based payphone line rates. MPTA Petition at 8-9, 11-13. Moreover, as early as November 10, 1999, MPTA requested this Commission to clarify the correct

application of the NST. The MPSC itself urged the Commission to issue a clarification.⁴ As MPTA points out, shortly after this Commission issued the *NST Review Order*, the Common Carrier Bureau ruled on the MPTA's initial petition, finding that the MPSC's 1999 order "appear[s] to be inconsistent with the Wisconsin Order" and sending the case back to the MPSC "for further state commission proceedings consistent with the [NST Review Order]." *North Carolina Payphone Association Petition for Declaratory Ruling, Order*, 17 FCC Rcd 4275, 4276 ¶ 3 (Com. Car. Bur. 2002).

The MPSC, however, failed to follow the guidance of the *NST Review Order*. Therefore, on the narrow but critical issue raised by MPTA – the establishment of the maximum overhead loading for the usage element of payphone line rates⁵ – it clearly serves the public interest for this Commission to further clarify the *NST Review Order* and declare that the MPSC decision is inconsistent with the *NST Review Order*.

II. DISCUSSION

The MPSC has incorrectly interpreted several key points in the *NST Review Order*. First, after listing the three methods allowed by the *NST Review Order* for purposes of establishing a ceiling on overhead loadings, the MPSC states that AT&T "may use the method best suited to its purposes to demonstrate that its IPP rates

⁴ See Letter to Michael K. Powell, Chairman, FCC from Laura Chappelle, Chairman, Michigan Public Service Commission, *et al.*, filed in *Wisconsin Public Service Commission*, CCB/CPD No. 00-1 (March 21, 2001).

⁵ The *NST Review Order* makes clear that cost-based local usage rates are an essential step in carrying out the requirements of Section 276. *NST Review Order* at 2070-71, ¶¶ 62-65. See especially ¶ 65 ("[a] non-cost based usage rate would . . . constitute an impermissible "end run" around the requirements of section 276").

comply with the NST.” *MPSC Order* at 18. The *NST Review Order*, however, states that the choice of an appropriate ceiling is up to the state commission, not the Bell company. *NST Review Order* at 2068 ¶ 54, 2069 ¶ 57.

Second, the MPSC stated that “*the MPTA* has the burden to demonstrate that SBC did not properly use the chosen method, or that proper use of the comparable services method would result in a finding that IPP rates do not comply with the NST.” *MPSC Order* at 18 (emphasis added). The *NST Review Order*, states that “BOCs bear the burden of affirmatively justifying their overhead allocation.” *NST Review Order* at 2069 ¶ 56.

Third, as MPTA explains in detail, the *NST Review Order* requires that either overhead loadings must be uniform or that deviations from the uniformity of overhead loadings must be explained. The MPSC has permitted non-uniform loadings, resulting in extremely high overhead loadings for local usage and leading to exorbitant local usage rates. Nothing in the MPSC indicates any basis on which such a gross disparity could be justified.

Fourth, as MPTA points out, the MPSC’s analysis of AT&T’s overhead loading for the local usage element is limited to a single sentence stating that “toll service is an appropriate competitive comparable service for local usage.” *MPSC Order* at 18. This appears to be an attempt to apply the *Physical Collocation Tariff Order*’s test for overhead loading. As described in the *NST Review Order*, however, the “comparable competitive service” test requires comparison of overhead loadings for the local exchange service under review with a BOC service with which the competitive service provider

competes.⁶ The *MPSC Order* does not show how PSPs compete with AT&T's toll service, and in fact they do not compete with that service.

Fifth, the *NST Review Order* emphasized that the *Physical Collocation Tariff Order* method requires BOCs to derive overhead loadings from "the lowest rates charged for [competitive] services." *Id.* ¶ 53. As the *NST Review Order* explained, "[b]y limiting the overheads applicable to expanded interconnection rates to the lowest overheads applied by LECs to competitive services, the Commission sought to prevent the incumbent LECs from disadvantaging competitors." *Id.* Assuming *arguendo* that the toll is a competitive service for purposes of the *Physical Collocation Tariff Order* method, the *MPSC Order* makes no finding and refers to no record evidence indicating that the toll rates used as a benchmark were the lowest rates charged for competitive services.

In sum, on the critical issue of the overhead loading for local usage, the *MPSC Order* fails to apply the *NST Review Order* guidelines. In effect, the *MPSC Order* does what the *NST Review Order* says may not be done, *i.e.*, it accepts "any overhead loading" as "'reasonable' for purposes of the new services test so long as it is justified by 'some plausible benchmark.'" *NST Review Order* at 2068-69 ¶¶ 55-56 (citations omitted).

The Commission should declare the *MPSC Order* invalid and should restate the *NST Review Order* guidelines to stress the points stated above.

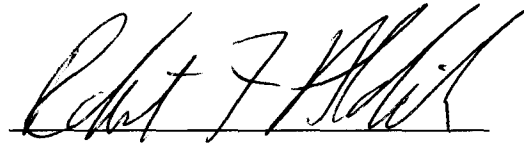
⁶ *NST Review Order* at 2067-68 ¶ 53. In the *Physical Collocation Tariff* proceeding, for example, the FCC required BOCs to justify their rates for collocation services by comparing the overhead loadings for those services with loadings for "the DS-1 and DS-3 services that compete with the services offered by collocated competitors." *Id.*

CONCLUSION

For the foregoing reasons, the Commission should grant MPTA's Second Petition for Declaratory Ruling.

Dated: June 23, 2006

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Robert F. Aldrich", written over a horizontal line.

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CERTIFICATE OF SERVICE

I hereby certify that on June 23, 2006, the foregoing Comments of the American Public Communications Council on MPTA's Second Petition for Declaratory Ruling was delivered via e-mail to the following:

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